

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

RALPH PAUL FERENCHAK

Debtor

CASE NO. 96-64663

Chapter 7

ADV. PRO NO. 96-70321A

APPEARANCES:

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Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion filed on November 5, 1997, by Pamela Ferenchak ("Defendant") for summary judgment in the adversary proceeding commenced by Ralph Paul Ferenchak ("Debtor") on November 8, 1996. The Defendant seeks a dismissal of the Debtor's complaint pursuant to Rule 56(c) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), as incorporated by reference in Federal Rule of Bankruptcy Procedure ("Fed.R.Bankr.P.") 7056.

The Court heard oral argument on the within motion on November 18, 1997, in Syracuse,

New York. The parties were afforded the opportunity to submit supplemental memoranda of law and the matter was submitted for decision on December 4, 1997.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1), (b)(2)(A) and (I).

FACTS

It is undisputed that the Defendant was awarded a percentage of the Debtor's enhanced earnings pursuant to a judgment of divorce dated on or about July 19, 1994, granted by the Honorable Bernard L. Reagan, Justice of the New York State Supreme Court ("State Court") which incorporated the terms and conditions of a prior order of the State Court dated on or about November 3, 1993. Thereafter, the Honorable Charles T. Major, also a Justice of the State Court, signed an order on or about July 16, 1996, designated as "Domestic Relations Order Number 3 of 3" ("QDRO-3"). *See* Exhibit "B" of Defendant's Memorandum of Law ("Defendant's Memo."), filed on November 5, 1997. QDRO-3 named the Defendant as an "alternate payee" of the Debtor's retirement benefits under the Surgical Associates of Upstate New York Employees' Defined Contribution Pension Plan and Trust ("Pension"). *See id.* Pursuant to QDRO-3, the Defendant was assigned \$473,257.30 "for the balance due on the enhanced earnings award heretofore granted the [Defendant] in the judgment of divorce." *Id.*

On October 7, 1996, and within ninety days of the date of QDRO-3, the Debtor filed a

voluntary petition (“Petition”) for relief under chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) (“Code”). The Debtor listed his Pension as an exempt asset in the amount of \$470,000 in Schedule C of his Petition. The Defendant was listed as a secured creditor holding a claim in the amount of \$470,000. *See* Schedule D.

The Debtor commenced the adversary proceeding herein by the filing of a complaint on November 8, 1996. The Debtor amended his complaint on January 23, 1997, and again on January 27, 1997 (“Second Amended Complaint”). As a first cause of action, the Debtor alleges that the interest granted to the Defendant pursuant to QDRO-3 “does not represent payment for alimony to or maintenance for or support of the defendant herein,” *see* Second Amended Complaint at ¶ 10, and constitutes dischargeable debt pursuant to Code § 523(a)(15). *See id.* at ¶¶ 11-12. For a second cause of action, the Debtor asserts that QDRO-3 is a judicial lien which impairs the Debtor’s pension exemption and may be avoided pursuant to Code § 522(f)(1). *See id.* at ¶ 15-16. The Debtor’s third cause of action alleges that QDRO-3 constitutes a preference pursuant to Code § 547. *See id.* at ¶ 22.

The Defendant filed an Answer to the Second Amended Complaint on March 14, 1997. The Defendant admits the Debtor’s allegation in ¶ 10 of his Amended Complaint that QDRO-3 does not represent alimony, maintenance or support. *See* Answer at ¶ 1. In her Answer, the Defendant asserts as an affirmative defense that QDRO-3 has been qualified and constitutes her sole and separate property. *See id.* at ¶¶ 6-7.

DISCUSSION

Fed.R.Civ.P. 56(c), as incorporated by reference in Fed.R.Bankr.P. 7056, provides that summary judgment must be granted where there is “no issue as to any material fact [such] that

the moving party is entitled to judgment as a matter of law.” *Federal Deposit Ins. Corp. v. Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991). In deciding a motion for summary judgment, a court must initially determine whether there are issues of material fact to be tried. *See LaFond v. General Physics Servs. Corp.*, 50 F.3d 165, 171 (2d Cir. 1995).

The Defendant moves this Court for summary judgment on the ground that QDRO-3 constitutes her sole and separate property and therefore, she is entitled to judgment in her favor as a matter of law. The Defendant argues in reliance on *Potter v. Potter (In re Potter)*, 159 B.R. 672, 676 (Bankr. N.D.N.Y. 1993) that a qualified domestic relations order providing for a debtor’s former spouse to receive a portion of the debtor’s pension does not create a debt between the former spouses. In opposition, the Debtor contends that pursuant to the divorce decree, the Defendant was awarded a percentage of the Debtor’s enhanced earnings which constituted an antecedent debt and that QDRO-3 effectively secured this prior obligation. Therefore, the Debtor argues that the Court’s decision in *Potter* is distinguishable because here the Defendant obtained rights to the Debtor’s pension pursuant to QDRO-3 which (1) secured the Debtors’ prior obligation to Defendant and (2) was granted within ninety days of the Debtor’s filing of his Petition, thereby constituting a preference.

The Court previously addressed the issue of whether pension benefits are dischargeable in *Potter* and held that a former spouse’s interest in a debtor’s pension constituted her sole and separate property and was not a debt of the debtor. 159 B.R. at 676. The debtor there sought to discharge pension benefits awarded to his former spouse pursuant to a divorce decree that were later incorporated in a qualified domestic relations order (“QDRO”). *See id.* at 673-74. The Court determined that the former spouse had no claim against the debtor for the payment of the

pension obligation because the provider of the pension was obligated to make these payments pursuant to the QDRO. *See id.* at 676. Accordingly, the debtor had no interest or rights in the portion of his pension that was transferred to his former spouse. *See id.* Therefore, the Court concluded that the division of the pension did not create a debtor/creditor relationship between the former spouses. *See id.*

In the matter before the Court, it is undisputed that the Defendant obtained an interest in the Debtor's Pension in the amount of \$473,257.30 pursuant to QDRO-3. Assuming *arguendo* that QDRO-3 constitutes a valid domestic relations order,¹ then based upon *Potter*, QDRO-3 would constitute the sole and separate property of the Defendant and would not be part of the bankruptcy estate. However, the Debtor alleges that QDRO-3 constitutes a preferential transfer which he may avoid. The Court notes that a chapter 7 debtor can seek to avoid a preferential transfer if the chapter 7 trustee fails to do so. *See McMahon v. Nourse (In re McMahon)*, 70 B.R. 290, 292 (Bankr. N.D.N.Y. 1987) (citing 11 U.S.C. 522(h)). A finding that QDRO-3 constitutes a preference would effectively bring the property transferred pursuant to QDRO-3 back into the Debtor's bankruptcy estate with the Defendant then holding only a claim against the Debtor based upon her previous award for enhanced earnings. Therefore, *Potter*, which did not consider any claim of preferential transfer, does not provide a factual basis for judgment in the Defendant's favor that as a matter of law her interest in the Debtor's Pension constitutes her sole and separate property. Upon review of the elements of a preference, *see* 11 U.S.C. §§ 547(b), (g), the Court finds that there is a material question of fact as to whether the Defendant received

¹The Court was provided with some evidence that the plan administrator of the Pension determined that QDRO-3 was officially "qualified." *See* Exhibit "A" of Defendant's Memo.

more from the transfer of property pursuant to QDRO-3 than she would have received if the transfer had not been made and she received payment to the extent provided by the Code in a case under chapter 7. *See id.* § 547(b)(5). Therefore, the Debtor must establish this element in order for the Court to determine whether as a matter of law QDRO-3 can be set aside as a preference simply leaving a debtor - creditor relationship between the Debtor and the Defendant.

If the Court concludes that QDRO-3 can be avoided as a preference and what is left constitutes a debt, then the issue becomes whether the debt can be discharged pursuant to Code § 523(a)(15).² One basis for dischargeability under this subsection is that a debtor does not have the ability to pay a debt which is analyzed under the disposable income test of Code § 1325(b)(2). *See Frey v. Frey (In re Frey)*, 212 B.R. 728, 737 (Bankr. N.D.N.Y. 1996). Additionally, a debt is dischargeable under Code § 523(a)(15) if the balancing of the equities between the Debtor and the Defendant favor the Debtor. *See id.* In order to decide this issue, the Court must be presented with evidence of the financial circumstances of the parties.

Based upon the foregoing, it is hereby
ORDERED that the Defendant's motion for summary judgment is DENIED and it is further
ORDERED that the pre-trial conference will be held on June 23, 1998, as scheduled on the
Court's calendar.

²The Court notes that the Defendant admitted in her Answer that the debt arising from her enhanced earnings award was not in the nature of alimony, maintenance or support; therefore, Code § 523(a)(5) is not applicable.

Dated at Utica, New York

this 28 day of May

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge